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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. 92

MABEL BLACK and T. Y. WULFF, in a representative capacity for, by and on behalf of Bio-Lab Union of Local 225, United Office and Professional Workers of America, its officers and members,

Petitioners,

vs.

CUTTER LABORATORIES, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION AND IN ANSWER TO BRIEF AMICI CURIAE.

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OPINIONS BELOW.

The opinion of the Supreme Court of the State of California is reported at 43 Cal. (2d) 788, 278 Pac.

(2d) 905. The opinion of the District Court of Appeal is reported at 122 A.C.A. 956, 266 Pac. (2d) 92.

JURISDICTION.

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. Section 1257(3). For reasons hereafter given (*infra*, pp. 14-24), respondent respectfully submits that petitioner is not entitled to invoke such jurisdiction, both because the petition presents no substantial Federal question and because petitioner failed to raise any of the alleged Federal questions in the Courts below in a timely manner.

QUESTIONS PRESENTED.

The Court below held that an arbitration award which directs that a member of the Communist Party—who is dedicated to that Party's program of "sabotage, force, violence and the like" be reinstated to employment in a defense plant is against public policy and is therefore illegal and void and will not be specifically enforced by the Courts.

The sole question presented, assuming that such question was timely raised, is whether or not such a holding deprives the Communist Party member, or the union to which she belongs, of any right, privilege or immunity under the Constitution or statutes of the United States.

The questions stated in the petition are not presented by the record which is before this Court, for the following reasons:

1. Question (1) is not presented because the decision below did not deny the petitioner union the right to enforce its collective bargaining agreement, nor did it deny the Communist Party member the right to engage in one of the ordinary vocations of life. All that the decision did was to deny the aid of the Courts in enforcing reinstatement of the Communist Party member to employment in respondent's defense plant "in order to carry on more effectively and more actively the program and activities of the Communist Party" (App., p. 105).

2. Question (2) is not presented because the decision below did not rest upon judicial notice of the doctrines and practices of the Communist Party. The Arbitration Board had found as a fact, upon the basis of substantial evidence, that Doris Walker was a member of the Communist Party "* * * with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail" (App., p. 44). The Court below merely applied the law to the facts found by the Arbitration Board (App., p. 92).

3. Question (3) is not presented for the reason stated under 2 above. The decision below did not without evidence classify all Communists, without exception, as dedicated to sabotage, treason and the overthrow of the government by force and violence. Mrs. Walker had been found *by the Arbitration Board*

to be a Communist Party member dedicated to that Party's program of "sabotage, force, violence and the like", and the Court's decision dealt with Mrs. Walker and with no one else.

4. Question (4) is not presented because the public policy invoked by the Court below, namely, the policy against treason and advocacy of the overthrow of the government by force and violence, long antedates the contract to which petitioner refers.

5. Question (5) is not presented for the reason stated under 2 above: The Court below did not give effect to the cited statutes "as legislative adjudications that the employee in question is guilty of criminal activities concerning which she has had no judicial trial." As a result of the hearing before the Arbitration Board, the forum which she selected, Mrs. Walker was adjudged to be a member of the Communist Party dedicated to that Party's program of sabotage, force, violence and the like. The Court below merely accepted this adjudication of the Board.

6. Question (6) is not presented because the Court below did not undertake to regulate the employment rights of Communists in defense industry. The petitioner union and Mrs. Walker voluntarily selected the state Courts as the forum in which to seek enforcement of Mrs. Walker's alleged employment rights, and all that the Court below did was to deny them the use of such Courts for the purpose of compelling respondent to reinstate Mrs. Walker in the employment which she had obtained "in order to carry

on more effectively and more actively the program and activities of the Communist Party" (App., p. 105).

STATEMENT.

Contrary to the statements made in the petition (p. 15), this case does not present any question as to the right of a Communist to make a living or "to eat".

Doris Walker, the employee involved in this proceeding, is and has been since 1942 an active, dedicated member of the Communist Party engaged in the promotion of that Party's program in the United States. She left her employment and career as an attorney in 1946 for the purpose of becoming more active in the Party program, and in October of that year, through deliberate concealment and misrepresentation, she secured employment as a label clerk in respondent's defense plant in order to "more actively and more effectively carry on the program and the activities of the Communist Party" (App., p. 105).

Upon realizing the full implications of Mrs. Walker's falsifications and misrepresentation, respondent discharged her summarily in October, 1949, notwithstanding the fact that by then she had become the president of petitioner union. Petitioner thereupon invoked the grievance procedure of its collective bargaining agreement with respondent as a means of compelling respondent to reinstate Mrs. Walker in order that she might continue her activities on behalf of the Party.

An Arbitration Board was convened pursuant to the collective bargaining agreement, and the matter was heard before the Board in July and August, 1950. During the course of this hearing Mrs. Walker was asked by counsel for respondent (Cl. Tr., p. 84):

> "Q. Mrs. Walker, are you now or have you ever been a member of the Communist Party?"

Petitioner's counsel objected to this question and the Board thereupon made the following ruling (Cl. Tr., p. 85):

> "The Chairman. We have come to a conclusion: that **we consider the question to be material.** The objection is overruled, but we want to couple the ruling with a statement of the Board: that we will not instruct the witness to answer if she does not care to answer the question, and she is at liberty to answer it or not to answer it as she chooses. If she should refuse, her refusal to answer will stand in the record **and, as in any case, the failure of a party to produce evidence justifies the fact-finding board in drawing inferences from it.** What inference we will draw from the refusal we have not determined now and we will let that await final determination of the case.
>
> Do you want to answer the question?"*

Mrs. Walker refused to answer the question on the ground that it was "an absolutely unwarranted invasion into my private beliefs" (Cl. Tr., p. 85). This was the only ground ever advanced by Mrs. Walker as the basis for her refusal and at no stage of the proceeding

*Throughout this brief, emphasis is ours unless otherwise noted.

did she invoke the privilege against self-incrimination. Thereafter, in the course of an interrogation which consumed 24 pages of typewritten transcript (Cl. Tr., pp. 85-109), she gave the same ground as the basis for refusing to answer numerous other questions concerning her Communist Party membership and activities.

Mrs. Walker was asked on cross-examination concerning her membership in the Federal Workers Branch in the Professional Section of the Communist Party; her membership in the South Side Branch of that Section; her office as Membership Director of the Professional Section of the Party; her appointment or election as Chairman of the Labor Committee of that Section; her membership in the Sunset Club of the Party; her appointment or election as Educational Director of that Club; her membership in the Cannery Club or the Cannery Workers Club of the Party; her membership in the Berkeley Section of the Party; the preparation in longhand and signature by her of a written report to the State Committee of the Communist Party dated July 10, 1946, three months before she sought employment at respondent's plant, in which she wrote that **"I tried to evaluate my action, as I try to evaluate whatever I do, from the point of view of the welfare of the working class and the strengthening of the Party;"** the preparation by her of a Communist Party interview card, in which she stated that she had held the positions of Organizer or Assistant Organizer or Membership Director or Educational Director of various Communist Party Clubs and Sections, that she had attended

the Cercon Class of the State School of the Party in 1945, and that she had given up the practice of the law **because there was little similarity between the professional people with whom she had to work and the class struggle;** her motives and purpose in leaving her employment in a law office and seeking employment in a plant; and her motives and purpose in seeking employment in various canneries and thereafter at respondent's plant.

She refused to answer any of these questions, and at the conclusion of the cross-examination she also refused to answer the following direct questions (Cl. Tr., pp. 107-108):

> "Q. Isn't it a fact, Mrs. Walker, that the reason why you listed John Tripp as a previous employer and also why you gave Dr. William Berke as a reference and Mr. Francis McTernan, Jr., as a reference was because of the fact that you were a member of the Communist Party and that you knew that the two McTernans and Dr. Berke would cooperate with you in concealing from Cutter Laboratories the fact that you had previously been employed as an attorney with the OPA and the Gladstein firm?
>
> * * * * * * *
>
> "Q. (By Mr. Johnson). And isn't it a fact that the reason why you listed those individuals and concocted this fictitious employer was because of the fact that you were a member of the Communist Party at the time and **that you desired to get into the Cutter plant in order to carry on more effectively and more actively the program and the activities of the Communist Party?"**

In the face of this evidence and conduct the Arbitration Board was compelled to and did find that Mrs. Walker was a member of the Communist Party "with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail" (App., p. 44).

Notwithstanding its finding as to Mrs. Walker's Communist Party membership and activities, the majority of the Arbitration Board directed that she be reinstated to employment in respondent's defense plant. Petitioner sought confirmation and enforcement of the award by the state courts under the procedure prescribed by the California Code of Civil Procedure (Sections 1287, 1288) and respondent filed a countermotion for vacation of the award. Respondent likewise interposed the following affirmative defense to confirmation and enforcement of the award (Cl. Tr., p. 60):

"I.

Respondent is informed and believes and upon such information and belief alleges that at the time Doris Walker, the claimant referred to in said petition, was discharged by respondent, and at the time the arbitration award referred to in said petition was made, the said Doris Walker was and now is an active member of the Communist Party dedicated to said Party's program of subversion, espionage, sabotage, force and violence.

II.

Said arbitration award directs respondent to reinstate the said Doris Walker as an employee in

respondent's manufacturing plant at Berkeley, California. Respondent is now and at all times hereinabove mentioned was engaged in the production at said plant of vaccines, serums, antitoxins, penicillin and other allied biological and pharmaceutical products which are vitally needed in the defense of the United States of America in time of war, and it would be against public policy for respondent to employ an active member of the Communist Party in said plant.

III.

Said arbitration award is against public policy and is illegal and void."

At petitioner's instigation, and over respondent's protest, the trial Court denied respondent a hearing on its affirmative defense and confirmed the award. Respondent appealed to the Supreme Court of the State of California from the judgment confirming the award (Cl. Tr., p. 148), and as a matter of routine, the case was transferred to the District Court of Appeal, First Appellate District, for hearing and decision. Thereafter, upon petition of respondent, the case was retransferred to the Supreme Court for hearing and decision directly by that Court.

When the case came to the California Supreme Court, the Court reviewed the evidence before the Arbitration Board and then accepted as binding the basic finding of fact, saying (App., p. 88):

"The evidence as to her (Doris Walker's) Communist membership and acceptance of party principles, with all the implications that flow

therefrom, thus stands unchallenged and uncontradicted by her and clearly supports the board's finding that the company honestly and correctly believed her to be a knowing and deliberately acting Communist."

The Court then applied its concept of the law and the public policy of the State of California to the facts as found by the Arbitration Board. Its review of the Federal and State statutes and judicial decisions dealing with Communism and the Communist Party (App., pp. 93-103) was not for the purpose of making an independent finding of fact contrary to the findings of the Board but rather for the purpose of making clear the "true implications of knowing membership in and support of the Communist Party" (App., p. 92).

The Court summarized its holding as follows (App., p. 105):

"Of no small significance in this connection is the fact that at the arbitration board hearing Mrs. Walker was asked, and she refused to answer the question, 'Isn't it a fact, Mrs. Walker . . . that the reason why you sought employment . . . at Cutter Laboratories was because you felt and believed, and had it in mind, that by obtaining that employment at that plant you could more actively and more effectively carry on the program and the activities of the Communist Party?' **It is, we think, indisputable that if Mrs. Walker sought and obtained employment at Cutter Laboratories so that she 'could more actively and more effectively carry on the program and the activities of the Communist Party,' her rein-**

> **statement in that employment would serve no cause save that of the Communist conspiracy. The courts of this country by making such an order would be but aiding toward destruction of the government they are sworn to uphold. The contract between Cutter Laboratories and the Bio-Lab Union cannot be construed, and will not be enforced, to protect activities by a Communist on behalf of her party whether in the guise of unionism or otherwise."**

In the light of this record and the decision below, it will be at once apparent to the Court that the question presented is not whether a Communist Party member should be allowed to make a living or "to eat," but whether such a Party member has a constitutional right to have the assistance of the courts of the State of California in compelling her reinstatement to employment in a defense plant in order that she may "more actively and more effectively carry on the program and the activities of the Communist Party."

SUMMARY OF ARGUMENT.

It is apparent that when the record and the decision below are correctly analyzed, this case presents no substantial Federal question. It is for this reason that the petition carefully avoids such an analysis, and seeks to mislead this Court into believing that the Court below found, without evidence and without according a hearing, that Doris Walker was a knowing and deliberately acting Communist dedicated to

the Communist Party's program of sabotage, force, violence and the like.

Decisions of this Court directly in point establish that the actual holding of the Court below—namely, that an arbitration award which directs that a member of the Communist Party who is dedicated to that Party's program of "sabotage, force, violence and the like" be reinstated to employment in a defense plant is against public policy and is therefore illegal and void—does not deprive the Communist Party member, or the union to which she belongs, of any right, privilege or immunity under the Constitution or statutes of the United States. Hence, the petition does not present any substantial Federal question for decision by this Court.

The reasons advanced in the petition for granting the writ are all premised on a false and misleading analysis of the decision of the Court below. To point up the falsity of this analysis, the statements made in support of each reason will be briefly considered. Since the brief of amici curiae merely elaborates upon the eighth and final alleged reason for granting the writ, our answer to such brief will follow our consideration of the eighth reason advanced in the petition.

Finally, we contend that if any substantial Federal question *is* presented by the petition, such question was not raised below in a timely manner.

ARGUMENT.

A. THE ACTUAL HOLDING OF THE COURT BELOW—NAMELY, THAT AN ARBITRATION AWARD WHICH DIRECTS THAT A MEMBER OF THE COMMUNIST PARTY WHO IS DEDICATED TO THAT PARTY'S PROGRAM OF "SABOTAGE, FORCE, VIOLENCE AND THE LIKE" BE REINSTATED TO EMPLOYMENT IN A DEFENSE PLANT IS AGAINST PUBLIC POLICY AND IS THEREFORE ILLEGAL AND VOID—DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In *Tarver v. Keach* (1872), 82 U.S. 67, this Court declared that "when 'a decision holding a contract void is made by the highest court of a State upon the general principles by which courts determine that a transaction is good or bad on principles of public policy, the decision is one we are not authorized to review.'"

This ruling has been consistently followed in subsequent decisions (*Stevenson v. Williams* (1873), 86 U.S. 572; *Chicago & Alton R.R. v. Wiggins Ferry Co.* (1877), 119 U.S. 615, 624; *N. O. Waterworks v. Louisiana Sugar Co.* (1887), 125 U.S. 18, 34), and is settled law.

An arbitration award, which arises out of and rests upon contract, has no greater sanctity than a contract. Therefore, since a decision holding that a contract is void on principles of public policy would not present a Federal question for this Court to decide, it follows that the decision of the Court below, holding that an arbitration award was invalid on public policy grounds, does not present a substantial Federal question.

B. THE REASONS ADVANCED IN THE PETITION FOR GRANTING THE WRIT ARE ALL PREMISED ON A FALSE AND MISLEADING ANALYSIS OF THE DECISION OF THE COURT BELOW AND ARE THEREFORE WITHOUT MERIT.

Reason No. 1. The assertion that "there is not an iota of evidence in the record that Mrs. Walker believed in or practiced . . . 'sabotage, force, violence and the like'" (Pet., p. 15) is false. Respondent presented convincing evidence to the Arbitration Board that Mrs. Walker was dedicated to these objectives of the Communist Party and that she was actively engaged in promoting these aspects of the Party's program. Mrs. Walker remained mute in the face of this evidence and steadfastly and wrongfully denied to respondent its right to a full and complete cross-examination of her concerning this evidence.

Beyond this, however, Mrs. Walker and the petitioner union selected the Arbitration Board as the forum before which to present their case, and in this Court they are bound by the Board's finding of fact that Mrs. Walker was a member of the Communist Party "with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail."

The decision of the Court below was confined to the case before it; namely, that of a knowing and deliberately acting Communist whose reinstatement into employment in a defense plant had been directed by an Arbitration Board in order that she might carry on more effectively and more actively the program and activities of the Communist Party. The decision does not go beyond this case and it does not deny to

Communists the right to work. Therefore, the decisions of this Court in the *Slaughter House Cases* (1872) 83 U.S. (16 Wall.) 36, 116, 122, *Allgeyer v. Louisiana* (1897) 165 U.S. 578, 589, and *Meyer v. Nebraska* (1923) 262 U.S. 390, 399, are not in point.

Reason No. 2. Since the decision below did not deny Communists the right to work it did not directly or by implication outlaw them or convert them into "political and economic pariahs" (Pet., p. 18). The decision merely denied a knowing and deliberately acting Communist the aid of Court process in securing reinstatement into a defense plant for the purpose of carrying on more effectively the program and activities of the Communist Party.

Reason No. 3. The assertion that a sentence of economic death was passed upon Mrs. Walker "without giving her a trial upon any of the issues regarded by the California Supreme Court as decisive" (Pet., p. 18) is unfair and untrue. Mrs. Walker had a full and fair hearing before the Arbitration Board, which was the forum she had selected. She was clearly and categorically warned that the issue of her Communist Party membership and activities was deemed material by the Board, and that all legitimate inferences would be drawn from a refusal to answer relevant questions concerning such membership and activities.

Notwithstanding this warning, Mrs. Walker deliberately refused to answer questions which she was bound by law and by good faith to answer (California

Code of Civil Procedure, secs. 2034-2065; *United States v. Bryan* (1950) 339 U.S. 323, 331). She denied to respondent its right to a "full and thorough cross-examination" (*Forman v. Sandusky, D. & C. R. Co.* (1862) 2 Ohio Dec. Reprint 611; *Union Oil Co. v. Reconstruction Oil Co.* (1935) 4 Cal. (2d) 541, 545). She blocked respondent at every turn in its effort to develop the full extent and scope of the conspiracy in which she and others were engaged, and she remained silent in the face of serious charges of Communist Party activity, including the charge that she had engaged in fraud, concealment and conspiracy because she "desired to get into the Cutter plant in order to carry on more effectively and more actively the program and activities of the Communist Party".

The Arbitration Board was fully justified in inferring that if Mrs. Walker had answered the questions concerning her Communist Party membership and activities truthfully, her testimony would have revealed the establishment in respondent's plant of a Party cell designed and intended to cripple the plant by sabotage, force, violence and the like, whenever it suited the purpose of the Party hierarchy so to do. The Board's finding that Mrs. Walker was dedicated to the Party's program of "sabotage, force, violence and the like" is clear and is amply supported by the evidence. The Court below so found (App., p. 92), and petitioner has advanced no reason or authority for this Court to depart from the general rule that it will not reexamine findings of fact by State Courts (*Drivers Union v. Meadowmoor Co.* (1940) 312

U.S. 287, 294; *Waters-Pierce Oil Co. v. Texas* (No. 1) (1908) 212 U.S. 86, 97).

Reason No. 4. In stating this reason, petitioner makes the amazing assertion that "Not until the issuance of the majority opinion of the Court below was the petitioner put on notice that" the doctrines of the Communist Party, or Mrs. Walker's own political views, "were regarded by an adjudicating agency as material" (Pet., p. 23).

Petitioner's own statement of the case gives the lie to this assertion. At page 8 of the petition it states that the arbitrators ruled that questions concerning Mrs. Walker's Communist Party membership and activities were relevant and that they would draw all justifiable inferences from her refusal to answer such questions.

In the face of this ruling Mrs. Walker had no right to assume that the decision of her case would not ultimately turn upon her Communist Party membership and activities, and if she had any evidence "in rebuttal of the views concerning Communism presented in the opinion of the court below", she had the opportunity and duty to come forward with such evidence before the Arbitration Board. Having failed to present such evidence, she cannot now complain that she has been denied a fair hearing.

Reason No. 5. This reason is premised upon the bald assertion that enforcement of the Arbitration Board's award was denied by the Court below because of a "public policy [which] was not in exist-

ence on October 16, 1949" (Pet., p. 25). Petitioner is careful not to define this "public policy" because to do so would be to destroy its argument.

The Court below, however, makes clear that this public policy is the policy against treason and the overthrow of the government by sabotage, force, violence and the like, and obviously such policy has been in existence for many years prior to October 16, 1949. As the Court also made clear, its citation of statutes passed and cases decided after that date was for the purpose of demonstrating the true implications of knowing membership in and support of the Communist Party (App., p. 92) rather than for the purpose of establishing the creation of a new public policy which had not theretofore existed. Hence, there is no basis for petitioner's argument that the Court applied these statutes in such a way as to impair the obligation of the collective bargaining agreement.

Reason No. 6. The assertion that Mrs. Walker "did not have the benefit of a judicial trial on" the charges of Communist Party membership and activities (Pet., p. 28) is but a reiteration of contentions which have already been answered. She was offered an opportunity for a judicial trial on these charges when respondent pleaded the charges as an affirmative defense in the trial Court (Cl. Tr., p. 60; see *supra*, pp. 9-10). She refused this opportunity, and at the hearing before the Arbitration Board she blocked every effort upon the part of respondent to develop the full scope of her activities on behalf of the Communist Party. Under these circumstances her cry that she

was denied a "judicial trial" and that she has been subjected to a "bill of attainder" is a hollow mockery which only a dedicated Party member would have the temerity to advance.

Reasons Nos. 7 and 8. These reasons appear to proceed upon vaguely defined theories of preemption. They ignore the fact that petitioner was the one who voluntarily selected the forum before the Arbitration Board and subsequently before the State courts. Petitioner had the option of proceeding before the National Labor Relations Board but chose not to do so —doubtless because Mrs. Walker had already received short shrift from a Trial Examiner for the Board in another proceeding when she contemptuously refused to answer relevant questions concerning her Communist Party membership and activity. Having invoked the jurisdiction of the State courts to enforce the arbitration award, petitioner cannot now assail that jurisdiction because it is dissatisfied with the result (*United Gas Co. v. R. R. Comm.* (1929), 278 U.S. 300, 307; *Hurley v. Commission of Fisheries* (1921), 257 U.S. 223, 225; *Booth Fisheries v. Industrial Comm.* (1926), 271 U.S. 208, 211).

Even if petitioner had standing to assail the jurisdiction of the State courts, however, its attack would be without merit. The Court below merely refused on grounds of public policy to lend the aid of the state courts to the efforts of a knowing and deliberately acting Communist to gain reinstatement to employment in a defense plant. It did not undertake to regulate the employment of Communists generally in

defense plants, nor did it trench upon the authority of the National Labor Relations Board to provide a remedy for unfair labor practices. There is no basis whatever for the claim that by its decision it has trespassed upon any field reserved for exclusive action by the Federal Government.

C. ANSWER TO BRIEF AMICI CURIAE OF CONGRESS OF INDUSTRIAL ORGANIZATIONS AND OF THE CIO-CALIFORNIA INDUSTRIAL UNION COUNCIL IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

The brief of amici curiae suffers from the same false and misleading analysis of the case before this Court as characterizes the petition. They ignore completely the evidence and finding that Doris Walker was a knowing and deliberately acting Communist who was seeking the aid of the State courts to secure reinstatement to employment in respondent's defense plant for the purpose of more actively and more effectively carrying on the program and the activities of the Communist Party. They seem willing to concede only that Mrs. Walker is a member of the Communist Party, and they build their argument upon the assumption that this was the only charge proved against her.

Amici Curiae would have this Court consider the case as if it were a proceeding to review a decision of a United States Court of Appeals refusing to enforce an order of the National Labor Relations Board directing reinstatement of Mrs. Walker after a finding that she had been discharged for union activities. It

might be interesting to speculate what the decision of this Court would be in such a proceeding, had petitioner and Mrs. Walker exercised their option to proceed before the National Labor Relations Board and had the facts concerning Mrs. Walker's Communist Party objectives and activities been fully developed through the traditional procedures for requiring her testimony concerning relevant questions (compare *Southern S. S. Co. v. Labor Board* (1942), 316 U.S. 31). The fact is, however, that petitioner and Mrs. Walker elected not to pursue their remedy before the National Labor Relations Board. Unquestionably, this was a deliberate choice and in making it Mrs. Walker undoubtedly had in mind that as an attorney-at-law she faced special embarrassment and risk in being subjected to the requirement that she either testify concerning her activities and objectives on behalf of the Communist Party or claim her privilege against self-incrimination. In view of this election, petitioner and Mrs. Walker have waived any claim to the benefits of the National Labor Relations Act or to the procedures provided in that Act for the correction of unfair labor practices (*United Gas Co. v. R. R. Comm.* (1929), 278 U.S. 300, 307, and other authorities cited *supra, p. 20*).

Since petitioner and Mrs. Walker elected to proceed in the State courts and they have now exhausted their remedy in such courts, this Court can take jurisdiction of the cause only if it determines that the decision below deprived Mrs. Walker or the petitioner of a right, privilege or immunity under the Constitu-

tion or statutes of the United States. Amici curiae limit their claim in this regard to the charge that petitioner and Mrs. Walker have been deprived by the decision below of rights given to them under the Labor Management Relations Act of 1947, 29 U.S.C. 157, and since any such rights have been clearly waived, the authorities arising under that Act which are cited and quoted by amici curiae are not relevant to this proceeding and no purpose would be served by an analysis or discussion of them.

D. THE FEDERAL QUESTIONS ASSERTED BY PETITIONER WERE NOT RAISED IN THE COURTS BELOW IN A TIMELY MANNER.

The holding of the Court below upheld a defense which was asserted by respondent at the outset of its pleading in the trial Court (see *supra*, pp. 9-10). As appears from the opinion of the District Court of Appeal (App., pp. 54, 71), the defense constituted respondent's "main contention" before that Court and was seriously and extensively considered by the Court (App., pp. 71-76). Certainly, unless it can be said that no litigant can be expected to anticipate that he will lose his case, petitioner was bound to anticipate that the decision of the California Supreme Court might be favorable to the defense. Therefore, if, in petitioner's opinion, such a decision would deprive petitioner of any right, privilege or immunity under the Constitution or statutes of the United States, petitioner was obligated to present such contention to the

Court below at a stage prior to its petition for rehearing, and having failed to do so, it is foreclosed from urging the contention at this time as a basis for review by this Court (*American Surety Co. v. Baldwin* (1932), 287 U.S. 156, 163; *Herndon v. Georgia* (1935), 295 U.S. 441, 443).

CONCLUSION.

For the foregoing reasons, respondent respectfully submits that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
August 29, 1935.

Respectfully submitted,

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